

August 22, 2005

VIA HAND DELIVERY AND ELECTRONIC MAIL

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
Crystal Square 4
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241 18th Street
Arlington, VA 22202-3402
FAX: (703)-602-0350

**RE: DFARS Case 2004-D017, Defense Federal Acquisition Regulation Supplement;
Combating Trafficking in Persons**

Dear Ms. Williams:

We write to provide comments on the draft amendments to Draft DFARS Clause 252.225-70XX, published in the Federal Register on June 21, 2005. The proposed regulations add to the legal arsenal of those seeking to fight trafficking in persons, and are therefore welcome. Particularly welcome is the inclusion of a broad definition of trafficking, one that includes trafficking for forced labor as well as for forced prostitution. While we support the introduction of these amendments, our research underscores the necessity of adopting a more aggressive approach to accountability for contractors and their employees.

To place these comments in context, Dr. Sarah Mendelson is a senior fellow at the Center for Strategic and International Studies. Dr. Mendelson conducted an extensive investigation into the links between Department of Defense contractors and trafficking in human beings in the Balkans in 2003 and 2004. Her research findings may be found in her report, Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans, published in February 2005 by the Center for Strategic and International Studies. Her investigation included travel to Kosovo and Bosnia and Herzegovina with representatives from the Office of the Inspector General of the Department of Defense in 2003. Her research was funded by a grant from the U.S. Department of State.

Martina Vandenberg, an attorney with Jenner & Block LLP, conducted an investigation into trafficking of persons into Bosnia and Herzegovina as a researcher for Human Rights Watch between 1998 and 2002. She authored the Human Rights Watch report, Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced

Prostitution, which documented allegations of involvement by U.S. DOD contractors in trafficking-related crimes. The report was published in November 2002.

The substantive comments on the proposed DFARS amendments offered here draw from our research findings in the Balkans. The CSIS report and the Human Rights Watch report both provide evidence that the proposed amendments require significant re-thinking and re-drafting to adequately respond to the realities in the field.

The concerns raised by the draft regulations fall into three general categories:

- The need to facilitate criminal investigation, and, where appropriate, prosecution of individual contractor employees for trafficking-related offenses, as permitted under the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261-3267) (MEJA);
- The need to provide guidance on appropriate training and policies on trafficking in human beings; and
- The need for due process protections for employees and restrictions on re-hiring of those found to have engaged in trafficking in human beings.

Criminal Investigation and Prosecution of Trafficking-Related Activities

As drafted, the proposed Section 252.225-70XX institutionalizes the ineffective procedures currently used by the Department of Defense contractor community in handling allegations of human trafficking. In multiple cases documented by Human Rights Watch, contractors quickly removed individual employees facing allegations related to trafficking out of the host country, effectively thwarting efforts to conduct investigations. In one case documented in Barracks and Brothels, a U.S. contractor country manager made *ad hoc* arrangements with local police to ensure that any of his personnel caught conducting illegal activities in the host nation would be immediately placed in his custody. He then arranged for rapid repatriation back to the United States.

Rapid repatriation back to the United States guarantees impunity for contractor employees who engage in trafficking in persons, rendering prosecution of those individuals under MEJA impossible. The amendments to Part 252 guarantee that this counterproductive pattern shall remain the norm. Section 252.225-70XX(h)(1) of the proposed DFARS clause simply requires the contractor to take "appropriate employment action, including removal from the host nation or dismissal...." Contractors already fire and repatriate employees, usually for the dual purpose of sparing themselves embarrassment and of obscuring alleged wrongdoing by their employees. In some cases, contractors permit employees facing criminal allegations to quietly resign and return home. The language of the regulation must place responsibility for facilitating criminal investigations on the contractor. At a minimum, the contractor must alert the Combatant Commander in theater. Credible cases of human trafficking should be referred to the relevant military criminal investigation division for immediate follow-up prior to the departure of the alleged perpetrator.

Section 252.225-70XX(g) and (h)(2) require that the contractor inform the Contracting Officer of any trafficking allegations and of the employment action taken in response to such allegations.

But neither provision makes any mention of the timing of this communication with the Contracting Officer. Even under a strict reading of the language of the draft regulations, a contractor could alert the Contracting Officer months after repatriating employees alleged to have engaged in human trafficking. We propose that the regulation require reporting to the Contracting Officer within 24 hours of receiving information about a violation of the anti-trafficking policy and before executing employment action.

Similarly, Section 225.7404-2 of the draft regulation fails to require contractors to inform the Combatant Commander within a certain time period, allowing contractor employees simply to resign and slip out of the country unnoticed and unquestioned. Our research suggests that alerting the Contracting Officer does not guarantee that the Combatant Commander will learn of any given incident. In 2003, the Combatant Commander of a major base in the Balkans was kept unaware of allegations of involvement by U.S. DOD contractor personnel in human trafficking. We suggest that the Contracting Officer be required to notify the Combatant Commander within 24 hours of learning of any information relating to Section 252.225-70XX (g), (h), or (i).

Section 252.225-70XX(i) requires the contractor to police its sub-contractors for violations of the anti-trafficking mandates. Again, however, the regulation makes no mention of any duty to report evidence of trafficking to the relevant law enforcement authorities, either in the host nation or within the U.S. command structure. “[S]ufficient evidence to determine that the sub-contractor is in non-compliance with its contractual obligations regarding trafficking in persons” should trigger not only termination of the sub-contract. It should trigger, as well, a criminal inquiry by investigators trained to recognize trafficking in persons. The omission of such a requirement merely reinforces the impunity now enjoyed by individuals who engage in trafficking while serving as U.S. contract employees abroad.

We find it regrettable that the proposed regulation requires training of contractor employees on MEJA (Section 252.225-70XX(f)(3)), but then outlines a set of standard operating procedures that permit contractor employees to avoid prosecution under that statute. By omission of the referral for criminal investigation, the proposed regulation would perpetuate the much-criticized status quo.

Anti-Trafficking Training and Policies

The draft amendments require that contractors provide training to their employees to make them aware of the U.S. government’s zero tolerance policy, host nation laws, U.S. laws, and Combatant Commanders’ directives on trafficking in persons. Section 252.225-70XX(f). Our research suggests that there is a serious lack of expertise inside the Department of Defense and within the contractor community on trafficking in persons. Given this lack of expertise, we are concerned that the regulation does not prescribe any role in this training for external experts or even suggest that contractors work with non-governmental organizations or experts on counter-trafficking to develop the training modules. We propose that language providing such guidance — or at least encouraging the involvement of outside experts — be added to the proposed amendments.

Due Process Protections and Rules for Re-Hiring

In order to avoid the sanctions of Section 252.225-70XX(j), a contractor need do little more than inform the Contracting Officer that it has fired one or more employees, long after the adverse employment action. This directive creates incentives to sacrifice employees in order to avoid U.S. government sanctions for failure to comply with the anti-trafficking regulations. The regulation should mention that the "operating procedures and applicable policies, laws, regulations, and directives" outlined in Section 252.225-70XX(h)(1) must ensure some due process for employees facing charges relating to human trafficking.

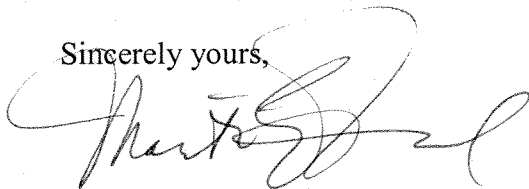
On the flip side of this equation, we are equally concerned that contractors not rehire employees disciplined for trafficking-related offenses. Permitting employees terminated for human trafficking to serve abroad again for the same or a different contractor in another host nation undermines the system of accountability that the U.S. government seeks to impose with the passage of this regulation. The current draft makes no mention whatsoever of whether such individuals may be rehired or transferred to another location for additional service.

Conclusion

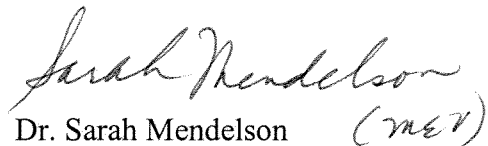
The proposed DFARS amendments fail to remedy the abysmal record of impunity for trafficking-related offenses allegedly committed by U.S. contractors abroad. The system for policing the behavior of contractor employees must be linked to criminal investigation and potential prosecution. The current draft is devoid of such linkage.

It is hoped that these suggested revisions will assist you as you edit and begin to implement the regulation. If you have any questions, please do not hesitate to contact us. We appreciate the opportunity to submit comments on this proposed rule.

Sincerely yours,



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